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No. 84-269

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

EDWARD J. BLOOM,
Petitioner,

v.

UNITED STATES OF AMERICA,

ON PETITION FOR WRIT OF CERTORARI TO THE UNITED STATE COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S RESPONSE TO BRIEF OF THE UNITED STATES IN OPPOSITION TO PETITION

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28 pp

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Petitioner will comment on the Government's "Statement" appearing on Pages 2-3 of its Brief in Opposition and will then respond to the points raised in the Government's Argument in

the same numerical order as these points are raised in the Brief.

COMMENT ON GOVERNMENT STATEMENT

(Pages 2 and 3)

The Government Brief states that petitioner travelled to Switzerland to pick up the money to pay for the explosives, and then hand carried the payments to each of the three manufacturers from whom Brower had arranged to obtain the explosives. (Page 2) These statements are not entirely supported by the record. At Brower's request, Petitioner obtained cash money from Brower's Swiss Bank Account. The record is not clear as to the disposition of this money. It is clear, however, that petitioner using Brower's money and at Brower's direction, paid for some, but not all, of the explosives purchased by Brower. In any event, these

acts by petitioner were each and all legal as Brower was (as petitioner knew) duly authorized by the United States to buy, sell, manufacture, import and export explosives.

On pages 2 and 3 the Government Brief states that petitioner "arranged" for a Chartered flight to transport the explosives to Libya but did not disclose to the Charter's agent that the cargo would be explosives. This statement is not supported by the record. Petitioner, at Brower's request and using Brower's money, paid for the airplane but the arrangements for the plane and lease of the chartered plane was between the airline and the freight forworder, who arranged for the flight.

On page 3 the Government Brief states that Brower paid petitioner

$ 10,000 for his efforts in connection with the explosives. Once again the Government relies on isolated portions of the transcript and omits references to the full transcript. Petitioner had been, as an attorney, paid a monthly retainer by Brower for seven or eight years prior to the shipment in question. Brower testified that he paid petitioner the $ 10,000 as a bonus for all of the good work petitioner had done for him.

On page 3 the Government, again relying upon isolated portions of the transcript, said that Brower testified that it was later, possibly in 1982, when petitioner asked him for the medallion. In fact petitioner had returned the medallion which Brower originally gave him as a National Security Counsel Identification piece to Brower and, after this case arose against petitioner, he

asked Brower for it, probably in 1982, to aid his defense herein. Brower testified that he had originally given the medallion to petitioner as an identification piece within his own organization before he testified to the request in about 1982.

1. The Government's Brief (page 4) correctly states that witnesses Douglas Smith and Peggy Brower were called by the defense, not by the Government. Peggy Brower was and is the wife of Jerome Brower and was his office manager at all relevant times. Douglas Smith was Brower's right hand man in Brower's business operations at all times here relevant.

In the suppressed portions of Smith's grand jury transcript he testified to working with Brower concerning building in Libya terrorist devices such as letter

bombs, gift jars of tea which would explode when opened and other secret booby trap devices. In the suppressed portions of Smith's testimony, he also testified concerning his involvement in the subject shipment. For example he questioned Brower if the purchaser of the subject shipment had the necessary export permits and Brower replied "They are working on it at the present time." (P. 7, Texas Grand Jury testimony, Sept. 11, 1982; Wm. testimony Sept. 13, 1980). Whereas, Brower had represented to appellant that the permits had been obtained.

Peggy Brower testified (150-153) in this case that she had no knowledge in 1977 of what Brower was doing with either Wilson, or his company Consultants International or Libya. In suppressed portions of Brower's grand jury testimony he testified to his wife (Peggy) going with him

from California to Washington, D.C., then to Wilson's farm in Virginia and from there to London, England with Mr. & Mrs. Wilson. In the suppressed grand jury testimony of Peggy Brower she admitted knowledge of Brower's Libyan activities in 1977.

At and prior to his trial, petitioner did not know of the participation of Smith and Peggy Brower in, or their knowledge of, Brower's involvement in the subject shipment and could not, therefore, question them concerning same. The government should have supplied petitioner with the suppressed portions of the grand jury testimony of Smith and Peggy Brower which related directly to the subject shipment. Petitioner could then question them about these matters and their falsehoods relating to same and used the material elicited from them to cross-examine

Brower, the only witness against petitioner on his crucial good faith defense and perhaps elicit exculpatory material.

Petitioner asserts that suppression of the testimony of Brower, Smith and Peggy Brower relating to Brower's prior 1976 shipment also unconstitutionally deprived petitioner of the opportunity to develop exculpatory material.

The Government contends (page 5) that the redacted testimony was not directly exculpatory; and that petitioner argues that he would have used it on cross-examinaton to impeach Brower's credibility. The Government then asserts that to be entitled to this testimony, petitioner must show that the suppressed evidence would have created "a reasonable" doubt that did not otherwise exist,citing United States v. Agurs, 427 U.S. 97, 109-

112 and United States v. Mesa, 660 F. 2d. 1070, 1076. Both Agurs and Mesa involved motions for new trial and the standard applicable to defendant's assertion of newly discovered evidence.

Here we are dealing with violations of petitioner's Sixth and Fifth Amendment rights crucial to a fair trial and petitioner's contention that these violations of his constitutional right to a fair trial vitiated the entire proceeding.

In Agurs, supra, the Court dealt at length with Brady v. Maryland, 373, U.S. 83, stating that Brady applies in three quite different situations, each involving discovery after tial, of information known to the prosecution but unknown to the defense. The Court in Agurs refers to Mooney v. Holahan, 294 U.S. 103 as illustrating the first situation in which the prosecution's case includes perjured

testimony and the prosecution knew or should have known of the perjury. A prosecution so obtained is held to be extended to cases like this one where the prosecution knew of, and suppressed, perjury of Brower, Smith and Peggy Brower in grand jury transcripts in matters relevant to this case. Peitioner had made specific requests for all grand jury testimony. This suppression unconstitutionally denied petitioner the opportunity, to use the suppressed material to develop evidence exculpatory to him in violation of his rights to due process.

Suppose for example, petitioner had been furnished this suppressed grand jury testimony of Smith and Peggy Brower and had questioned them concerning same and they, or one of them, testified that Brower told the witness that the operation was one of the National Security

Council, or a clandestine one, or one which was illegal.

In Curry v. Secretary of the Army, 595 F. 2d. 573 (D.C. Cir. 1979) the Court said on page 876 "...a showing of actual perjudice is not a pre-requisite to finding a conviction constitutionally invalid on due process grounds...and that if a procedure involves a possibility that prejudice may result...it will be struck down and the conviction reversed..." Citing Estes v. Texas, 381 U.S. 532, 542-43.

On page 5 of the Reply the Government states that there was no Brady violation because petitioner was independently aware of the redacted transcript information and in the footnote on that page it is said that "We are advised that petitioner in fact attended Wilson's trial, which preceded his." It is true

that petitioner attended a portion of the Wilson trial and testified as a witness in that trial. Petitioner's attendance at portions of the Wilson trial was not sufficient to apprise him of the suppressed material.

Petitioner was not permitted to see the unredacted grand jury transcripts until after his trial and conviction when he was permitted to see some in aid of his appeal and learned for the first time of the suppressions of the tran scripts. Not knowing the precise contents of the redacted material, petitioner was not in a position to move the trial court for what he did not know existed, let alone make a showing of "particularized need" for same at or in advance of his trial.

2. The crux of petitioner's argument concerning the waiver of jury is

that it involves the fact that Brower was the only witness to testify against petitioner on the issue of his good faith (National Security Council) defense based upon Brower's giving petitioner the medallion and saying it was a National Security Council identification piece. Bearing in mind that the testimony of a single witness to criminality is closely scrutinized and wide cross-examination of such witness is allowed, petitioner would never have waived jury if he had known of the existence of the suppressed grand jury testimony of Brower, his wife and Smith directly relating to this case. The suppressed material contained perjury and changing of stories before various grand juries. The suppression of this grand jury testimony deprived petitioner of opportunity to cross-examine Brower

about many of his lies and terrorist activities.

Further, the suppression of the grand jury testimony of Smith and Peggy Brower, deprived Petitioner of the opportunity to question them about many relevant things, especially their knowledge or information, if any, about the operation being an operation of the National Security.

This suppressed material contained explosive ammunition for cross-examination before a jury and if petitioner had known of some at the time of his jury waiver, he would not have waived jury.

The Government states (page 7) that there is no basis for finding that petitioner's waiver of a jury trial was anything but voluntary. It was not voluntary because the waiver of jury trial was induced by representations of the court

and the prosecutor that he had been furnished all relevant grand jury transcripts, which representations were erroneous; in reliance upon these representations, petitioner waived jury unaware of the suppressions of the grand jury transcripts. If petitioner had been furnished these suppressed portions of the transcripts, he would not have waived jury trial.

3. Petitioner believes that the Third Question presented in the Petition, and the Government's Reply thereto (its Brief, pages 7-9) are moot since this court denied Wilson's Petition for Certorari, No. 84-5411. This denial was after the Petition and the Reply were filed filed. Believing the matter to be moot, petitioner will make no response to the material on pages 7-9 of the Brief relating to this question.

4. The Reply Brief (pp. 9-11) of the United States apparently does not understand the thrust of petitioner's argument against the Rubino affidavit. On page 9 it is stated that Brower "had told petitioner that if he were stopped by BATF or Customs officials, he should display the medallion and they would 'go away'" (referring to Pet. App. C-1) and that the Rubino affidavit stated that he had contacted the two agencies mentioned by petitioner, BATF and Customs, as well as the C.I.A. Petitioner App. C1 is a copy of petitioner's handwritten letter (Pet. App. C) which he delivered to Judge Sterling in compliance with Classified Information Procedures Act (CIPA), 18 U.S.C. App. III), Pet. App. C-1 clearly states that Brower told petitioner that

if he were stopped by BATF or Customs "or any other federal official" to show the medallion and the official would go away. Petitioner's App. C, as well as petitioner's testimony concerning same, clearly refer to National Security Council Identification piece, not to BATF, Customs, CIA, or any other agency except National Security Council.

Petitioner's letter (App. C) to Judge Sterling was followed by filing formal Notice of Intent to disclose Classified information as required by CIPA.

As stated on page 60 of the Petition the Government should have filed an affidavit from a qualified affiant or produced a competent witness to testify whether or not the records of the National Security Council reveal anything about the medallion and testify that the

shipment of explosives was or was not authorized by that council or its representative. When assertion is made that material is classified and the government alone is in possession of all evidence material to the inquiry, it should be required to produce the evidence. Its failure to do so violates petitioner's Sixth Amendment right of confrontation, cross-examination, compulsory process and Fifth Amendment rights to due process and a fair trial.

Petitioner introduced the Rubino affdavit for the purpose of showing that, since it does not mention the National Security Council (the only relevant agency), the affidavit shows by implication that the medallion was not shown to that agency.

The failure of the Government to produce competent evidence as to whether

or not the medallion was a National Security Identification piece, coupled with the suppression of relevant grand jury testimony and petitioner's consequent lack of opportunity to use same to cross-examine Brower and question Smith and Peggy Brower concerning their knowledge, if any, of whether or not the operation was one of the National Security Council, denied petitioner a fair trial.

In United States v. Smith, No. 84-5240, 4th Circuit, filed December 21, 1984, the Court held that CIPA is procedural and does not change the standards for determining relevance and admissibility. The Court further held that in proceedings under 6(a) of CIPA to determine "the use, relevance, or admissibility of classified information." The court is not empowered by either

CIPA or precedent to exclude classified evidence that is relevant to the defense of the accused.

The only evidence against appellant's good faith defense was Brower's denial of the statement he made to petitioner that the medallion was an identification piece of the National Security Council. Whether it was or not was crucial to petitioner's good faith defense. Brower had admitted giving the medallion to Petitioner and testified that it was supposed to be an identification piece within his own organization, This explanation is absurd as petitioner knew all of Brower's people. This explanation was not supported by any of Brower's people. Brower's testimony concerning the medallion was shifty and evasive and was a story concocted by him to escape prosecution if he told the truth.

Brower stood on the witness as an admitted, deliberate felon, terrorist, cheat, perjuror. In addition he faced prison if he told the truth about telling petitioner that the medallion was an Identification piece of the National Security Council. If he admitted saying that, he would admit violating criminal Statutes of the United States. 18 U.S.C. Sec. 701 (Petitioner's App. 1, page 2) makes it a crime to possess a false badge or identification piece of any agency of the United States and 18 U.S.C. Sec. 912 (Petitioner's App. 1, page 3) makes it criminal falsely to pretend to be an officer or employee acting under the authority of the United States or any agency thereof.

It is well settled that a defendant is allowed wide latitude in cross-examing the only witness against him in a

conspiracy case, especially on a crucial issue involving criminality. In United States v. Partin, 493, F. 2d. 750 (1974, 5th Cir.) the Court said at page 760:

> "The Supreme Court has recosnized that where the governments case in a criminal prosecution may stand or fall on the jury's belief or disbelief of one witness, that witness's credibility is subject to close scrutiny..."
> Citing Gordon v. United States, 344 U.S. 414 (1953)

Under Federal Rules fo Evidence 608 (b) "bias of a witness is not a collateral issue and extrinsic evidence is admissible to prove that a witness has a motive to testify falsely". United States v. James, 609 F. 2d. 36, 2nd Cit. 1979 Cert. Den. 445 U.S. 905, quoting from United States v. Harvey, 547 F. 2d. 720, 722 (2nd Cir. 1976). See also United States v. Haggett, 438 F. 2d. 396 (2nd Cir. 1976), Cert. Den. 402 U.S. 946.

Further, Brower's perjury before various grand juries contained in suppressed transcripts may be shown by extrinsic evidence or extracted from the witness on cross examination, subject to the exception for relevancy and self- incrimination. United States v. Varelli, 407, F. 2d. 735, (1969, 7th Cir.), Denial to petitioner of the full transcripts containing this perjury deprived petitioner of a fair trial in denying him the material with which to cross-examine Brower to expose his various lies and changes of stories and to explore his motive in testifying falsely against petitioner. Petitioner should have been allowed wide latitude in cross-examining Brower as the sole witness against him on his good faith defense and under Evidence Rule 608 (b) to show specific instances of Brower's conduct as hearing

on Brower's motive to testify falsely, which motive was fear of prison if he told the truth, thereby admitting his commission of a crime.

As stated in Davis v. Alaska, 415 U.S. 308 (1973) at page 319:

> "Petitioner was thus denied the right of effective cross-examination which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it. Brookhart v. Janis, 384 U.S. 1, 3, Smith v. Illinois, 390 U.S. 129, 131 (1968)"

CONCLUSION

The petition for Writ of Certorari should be granted.

Respectfully submitted,

_____

EDWARD JOHN BLOOM

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
COUNTY OF RIVERSIDE) ss.

I, the undersigned, say: I am a resident of the County of Riverside; over the age of 18 years and not a party to the within action or proceeding; that my address is 2611 Linden Way # C, Palm Springs, California 92264.

That on the 9th day of January, 1985, I served the within paper PETITIONER'S RESPONSE TO BRIEF OF THE UNITED STATES IN OPPOSITION TO PETITION by depositing said 2 copies enclosed in a sealed envelope with postage hereon fully prepaid, in the United States Postal Service mail box at the City of Los Angeles, California, addressed as follows:

Rex E. Lee
Solicitor General
Stephen S. Tratt, Assistant Attorney Gen.
Francis J. Martin, Attorney
Department of Justice
Washington, D.C. 20530

I declare under penalty of perjury that the the foregoing is true and correct.

Executed on January 9th, 1985 at Los Angeles, California.

M. KNOTT